which Lord Coke based his distinction. None of the other authorities cited by the counsel have any tendency to support his position, and it is very clear that it is untenable.

The precise question was decided by the Supreme Court of Massachusetts, in the case of *Eldridge* vs. *Forrestal*, 7 Mass., 253; and in *Beekman* vs. *Hudson*, 20 Wend. 53, it was assumed as perfectly clear, that in such a case the widow was not entitled to dower.

There can be no pretence that the widow is entitled to the fund in question as personal estate, under the statute of distributions. The money is the product of the land taken, and must belong to the person entitled to the land which it represents, and out of which it arose. Besides, the title had already vested in the heirs when the proceedings for extending the street were commenced; and if the widow had then no right of dower in the premises, she of course can have no right to the money, even if it is to be considered personal estate.

The judgment of the Supreme Court must be affirmed.

J. M. Buckingham, attorney for appellant.

D. Thurston, attorney for respondents.

NOTICES OF NEW BOOKS.

ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS. By HENRY SUMNER MAINE, London. 8vo, 415 pp.

We have read every word of this work with pleasure, and hasten to commend it to the general reader as well as the professional student, and only regret that the space we can occupy in this jonrnal will be so inadequate to do it justice. If it does no more, it will help to show that there may be a literature in the law which may be cultivated to advantage, if men will bring to its study the taste of the scholar, as well as the research of the historian and diligent collector.

Mr. Maine was, at one time, Regius Professor of the Civil Law in Cambridge, England, and, as is stated in the title page of the work, is "Reader on Jurisprudence and the Civil Law at the Middle Temple." The work manifests great research as well as profound reflection, which, though guided chiefly by the light of the learning of the civil law, aims to reach higher functions than the code or the twelve tables. Its first chapter

treats of "Ancient Codes." He finds the elements of the earliest of these in the "Themis" or "Themistes," spoken of by Homer, which were simply judgments of kings in matters of dispute, which were supposed to be divinely inspired. But he more than conjectures that an analysis of Sanscrit literature, when completed, will show a source still more remote than even that which is discoverable in the pages of Homer. The word "*Nomos*," a law, does not, as he says, occur in Homer. In the infancy of mankind, the idea of a legislature prescribing future laws is not to be conceived of.

Mr Maine undertakes to trace the idea of a *code of laws* drawn from separate judgments, originally declared by the head of the tribe or family, under the supposed dictation of divine agency, to a "juristical oligarchy," who claimed to monopolize the knowledge of the laws or principles upon which quarrels were decided, giving rise to what is called "customary law," the only true unwritten law known in history. The early English judges assumed to possess a knowledge of this, and made free use of it in pronouncing their judgments. But as soon as the Courts of Westminster began to base their judgments on recorded cases, the law which they administered became written law.

The stage, in its progress after the period of customary law, was that of codes, of which the Roman XII. tables became the most famous. But whether those of Solon, Draco, or the twelve tables, they are supposed to have originally been destitute of order in the arrangement of their parts. The value and importance of these codes is thus presented in the work before us. "The fate of the Hindoo law is, in fact, the measure of the value of the Roman code. Ethnology shows us that the Romans and Hindoos sprung from the same original stock, and there is, indeed, a striking resemblance between what appear to have been their original customs. Even now, Hindoo jurisprudence has a substratum of forethought and sound judgment, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities. From these corruptions, the Romans were protected by their code. It was compiled while usage was still wholesome, and, a hundred years afterwards it might have been too late."

It is the object of the work to trace the steps in the progress of what is now known as law; and in doing so, the author too is led to remark how few of the races or nations that have existed have actually been progressive in their social organization. But with regard to those, "it may be laid

down," says Mr. Maine, "that social necessities and social opinion are always, more or less, in advance of law.—Law is stable, the societies we are speaking of are progressive." The agencies by which law is brought into harmony with society, he classes under those "instrumentalities" which he goes on to illustrate: legal fictions, equity, and legislation. Of these, we can only give the definitions, in their application by the author. "I now employ the expression, Legal Fiction, to signify any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified." "The next instrumentality by which the adaptation of law to social events is carried on, I call Equity; meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles, and claiming to supercede the civil law in virtue of a superior sanctity inherent in those principles." "Legislation, the enactments of a legislation which, whether it take the form of an autocratic prince, or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from legal fictions just as equity differs from them, and it is also distinguished from equity as deriving its authority from an external body or person. Its obligatory force is independent of its principles."

The second chapter of the work is devoted to the subject of Legal Fiction; the third to the Law of Nature and Equity; the fourth to the Modern History of the Law of Nature; and the fifth to Primitive Society and Ancient Law. The latter will be found of peculiar interest. It seeks to establish, and, seemingly, with complete success, that society was not in primitive times "a collection of individuals," but "an aggregation of families." "The unit of an ancient society was the family; of a modern society, the individual." "The aggregation of family forms the gens or house; the aggregation of houses makes the tribe; the aggregation of tribes constitutes the commonwealth." This leads the author to a consideration of the ancient family, the "patria potestas," or power of its ancestor or head, which he holds to be "the *nidus* out of which the entire law of persons has germinated." He pursues the subject as it was developed in the Roman law, into the various elements of society; the condition of woman, the institution of guardianship, the relation of master and slave, which do not take their rise from any contract; they form a *status* through which society passes to that of *contract*, or such conditions as are the immediate or remote result of agreement.

The next two chapters treat of the early history of testamentary succession, and of ancient and modern ideas respecting wills and succession, involving, among other things, the interesting subject of primogeniture in relation to lands, and the extent to which it has prevailed. But, to most readers, the two succeeding chapters upon "the early history of property" and "the early history of contract," will be found of more immediate interest. They will, certainly, richly repay any one whose taste may lead him to a profound and discriminating discussion of the elementary principles which lie at the foundation of society, and the purposes for which it was organized and is sustained.

We regret that the space already occupied will not admit of giving, as we intended at first, an analysis of these chapters, nor of the remaining one on "the early history of delict or crime," with which the work closes.

This brief outline of the work will give the reader some idea of what it contains, when he is told that the writer, though sometimes speculative in his views, and often, from the nature of the subject, more or less conjectural in his premises, has brought to it great ability and diligence, excellent taste, and sound discrimination. He is, evidently, thoroughly imbued with the knowledge and love of the civil law, which he treats in the modern historical manner. He has added a valuable contribution to the literature of jurisprudence, a department in which the common law is so signally deficient. All our ancient, and too many of our modern treatises upon the common law, are as destitute of the graces of style or the amenities of literary culture as a problem in Euclid, or a time table in a railway guide. It is partly the fault of those who use books. Here and there, writers in our own country, for instance, have undertaken to treat of the history of our law and of our courts, and have done it with good taste, but, we apprehend, the only reward they have reaped for their labor has been the thanks of here and there a reader, whose curiosity may have led him to purchase their works.

In the case of the civil law, the reverse of this has often, perhaps generally been true. The code itself was compiled by the ablest of men, in the style of the best writers of the Augustan age, which had itself passed by, leaving its impress upon Roman literature. And since the revival of letters in Europe it has called forth some of the best educated minds and classical writers in the different universities and states of the continent. We trust the day is not distant when, if the common law can

not be clothed in as attractive a form, it will slough off the shreds and uncouth patches of a barbarous language, and marks of an unlettered age, which have clung to the pages of the best of its writers.

We look to the law schools, which have become somewhat numerous of late in our country, to do something towards improving the literature and philosophy of the law here, as works like that of Mr. Maine can hardly fail to do, wherever they are read. In the reforms in the matter of preliminary study, by those who are to become members of the profession, England, we think, has but followed this country in providing the requisite schools and teachers of the law. Nor are the writers, in some departments of the science, here at all behind those of the mother country. But much improvement may yet be made in both, in the literature of elementary works, and such text books, especially, as are designed for the student. A more readable book, or one better calculated to cultivate the attractive qualities of a good style, cannot easily be found, than the histories of Blackstone. And it is difficult to see why those who are at the head of the law schools of our country, may not do much, if not so much as he, in the lectures and treatises which they prepare, in supplying the want which has been felt in attempting to divest the science of the law of the rough and unattractive garb in which it has hitherto been clothed. The pursuit of a science so varied, so noble, and so elevated, surely ought not to be irksome or distasteful for want of a proper elementary teaching. And one way in which this defect can be supplied, we apprehend, is by tracing historically, as Mr. Maine has done, in the lecture room or by suitable treatises, the share which the Roman law has had in building up the present admirable system of the common law, upon the dry but steady stock of Feudalism.

But we hasten to close this desultory notice of the work before us, by a brief extract or two from the ninth chapter, in which the writer treats, among other things, of the influence of the study of the Roman law upon the European mind, considered in its connection with the metaphysics and metaphysical theology which had their origin in the eastern empire, and for three centuries, at least, engaged the mental energies of the Roman world. "Meanwhile one department of inquiry, difficult enough for the most laborious, deep enough for the most subtle, delicate enough for the most refined, had now lost its attractions for the educated classes of the western provinces. To the cultivated citizen of Africa, of Spain, of Gaul, and of Northern Italy, it was jurisprudence, and jurisprudence only, which

stood in place of poetry and history, of philosophy and science. So far, then, from there being anything mysterious in the palpably legal complexion of the earliest efforts of western thought, it would rather be astonishing if it had assumed any other hue. We can only express our surprise at the scantiness of attention which has been given to the difference between western ideas and eastern, western theology and eastern, caused by the presence of a new ingredient." "Few things in the history of speculation are more impressive than the fact that no Greek-speaking people has ever felt itself seriously perplexed by the great question of Free-will and Necessity." "Legal science is a Roman creation, and the problem of Free-will arises when we contemplate a metaphysical conception under a legal aspect." "The problem of Free-will was theological before it became philosophical, and if its terms have been affected by jurisprudence, it will be because jurisprudence has made itself felt in theology."

COMMENTARIES ON EQUITY JURISPRUDENCE, as administered in England and America. By JOSEPH STORY, LL. D., one of the Justices of the Supreme Court of the United States, and Dane Professor of Law in Harvard University. Eighth Edition. Carefully revised, with extensive additions By ISAAC F. REDFIELD, LL. D. In two volumes. Boston: Little, Brown and Company, 1861.

In 1835, the late Mr. Justice Story, in pursuance of the request of his frie d, Nathan Dane, made by will, and as a portion of the course of study at the Dane law school, prepared his volumes of equity jurisprudence. In his preface to the first edition the learned judge tells us, "in submitting it to the profession it is impossible for me not to feel great diffidence and solicitude, as to its merits, as well as to its reception by the public. The subject is one of such vast variety and extent, that it would seem to require a long life of labor to do more than to bring together some of the more general elements of the system of equity jurisprudence, as administered in England and America. In many branches of this most complicated system, composed (as it is) partly of the principles of natural law, and partly of artificial modifications of those principles, the ramifications are almost infinitely diversified; and the sources, as well as the extent of these branches, are often obscure and ill-defined, and sometimes incapable of any exact development. I have endeavored to collect together, as far as my own imperfect studies would admit, the more general